

Federal Communications Commission

DA 01-745

Before the
Federal Communications Commission
Washington, D.C. 20554

2001 MAR 28 A 10: 06

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments,)
FM Broadcast Stations.)
(Lordsburg and Deming, New Mexico))

MM Docket No. 01-79 /
RM-10088

NOTICE OF PROPOSED RULE MAKING

Adopted: March 14, 2001

Released: March 23, 2001

Comment Date: May 14, 2001

Reply Comment Date: May 29, 2001

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Runnels Broadcasting System, LLC, licensee of Station KQTN,¹ Lordsburg, New Mexico, requesting the reallocation of its channel to Deming, New Mexico, and modification of its authorization accordingly. Petitioner stated its intention to apply for Channel 250C if it is reallocated to Deming.

2. Petitioner filed its request pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). Under Community of License we determine whether the proposed reallocation will result in a preferential arrangement of allotments. In this situation, that determination is based upon the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).²

3. In support of the proposal petitioner states that the reallocation of Channel 250C to Deming (pop. 10,970)³ will result in the provision of a second commercial FM service as well as a fourth local

¹ Although Station KQTN is licensed on Channel 249A at Lordsburg, it was modified in MM Docket No. 84-460 to Channel 250C. Petitioner holds a construction permit for Channel 250C at Lordsburg, which specifies less than full Class C facilities (i.e., 20 kW at 612 meters HAAT (see File No. BPH-19961119MD).

² The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. (Co-equal weight is given to priorities (2) and (3).]

³ Population figures reported herein were taken from the 1990 U.S. Census.

aural service at that community.⁴ Additionally, petitioner reports that from its intended site at Deming at coordinates 32-21-00 NL and 108-24-30 WL, Channel 250C will provide a 70 dBu signal over the entire community. Moreover, petitioner avers that the proposed reallocation of Channel 250C to Deming is mutually exclusive with both the KQTN licensed facilities as well as the outstanding construction permit. Further, petitioner advises that Lordsburg (pop. 2,951), has been allocated Channel 279C3, and that several other channels are available there for other interested parties, including Channels 233C3 and 228C3.

4. Based upon the information presented, we are unable to determine whether the petitioner's proposal to reallocate Channel 250C from Lordsburg to Deming, New Mexico, would result in a preferential arrangement of allotments. In evaluating proposals pursuant to Section 1.420(i), the Commission stated that the public has a legitimate expectation that existing service will continue, regardless of whether it is a transmission or reception service, and that this expectation is a factor we must weigh independently against the service benefits that may result from the reallocation. See Change of Community MO&O, *supra*. Further, the Commission indicated that under some very limited circumstances it would consider that the removal of a sole local service may be justified if there are compelling public interest factors to offset the expectation of continued service (such as the provision of a first reception service to a significantly sized population). While the instant proposal would provide a second local FM service as well as a fourth local aural service at Deming, (priority four), it would also result in the removal of the only licensed facility at Lordsburg (priority three).⁵ With respect to vacant Channel 279C3 at Lordsburg, the Commission has stated that with regard to change of community requests, neither a vacant allotment nor a construction permit can be considered as a substitute for an operating station. See Change of Community MO&O, *supra*. Therefore, petitioner should provide additional information demonstrating how the public interest would be served by providing Deming with its fourth local aural service at the expense of Lordsburg losing its sole existing local service.

5. Additionally, as the petitioner proposes to relocate the transmitter site of Station KQTN to accommodate its request, the proposal will result in areas that will lose existing reception service as well as areas that will gain new reception service. Therefore, petitioner is requested to provide data regarding areas and populations that will gain service as well as those that will lose existing service if Channel 250C is reallocated to Deming, as requested. The requested data should also include the total reception services that are now available within the gain and loss areas.

⁴ Deming is currently served locally by Station KDEM, Channel 232A, Station KZPI, Channel 219A, and fulltime AM Station KOTS.

⁵ Additionally, we note that in MM Docket No. 98-222, Channel 288C1 was substituted for Channel 289C3 at Lordsburg and reallocated to Hurley, New Mexico, as that community's first local aural transmission service. See

6. In consideration of the above, we will propose to reallocate Channel 250C from Lordsburg to Deming, New Mexico, as requested, and to modify the authorization for Station KQTN provided the petitioner successfully demonstrates that the proposal will result in a preferential arrangement of allotments. Pursuant to Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 250C at Deming.

7. Channel 250C can be allotted to Deming consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site located 61.9 kilometers (38.4 miles) west of the community at coordinates 32-21-00 NL and 108-24-30 WL. As Deming is located within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission must obtain Mexican concurrence for Channel 250C at that community.

8. In view of the above, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Deming, New Mexico	232A	232A, 250C
Lordsburg, New Mexico	250C, 279C3	279C3

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before May 14, 2001, and reply comments on or before May 29, 2001, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW; TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James K. Edmundson, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, DC 20016

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW., Washington, D.C.